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NO. 82-1922

IN THE

Supreme Court Of The United States

October Term, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The written consents of the Solicitor General on behalf of the respondent, the United States, and of the attorney for petitioner, National Association of Regulatory Utility Commissioners, have been obtained. The consent of petitioners, Southern Motor Carriers Rate Conference, Inc., and North Carolina Motor Carriers Association, Inc., was requested, but refused.

EEI is the association of the nation's investor-owned electric utility companies. EEI previously has not participated in the

instant case either as a party or as *amicus curiae*. However, counsel on this brief for EEI prepared and filed with the consent of all parties a brief *amicus curiae* in support of the petition for certiorari in this case on behalf of Southern Company Services, Inc., which was acting as agent for several members of EEI.

EEI has no interest in the practice of collective ratemaking, which is an activity peculiar to carriers. EEI's interest in this case arises from the fact that its members, as electric utilities, are subject to state regulation of service, price and other aspects of their businesses, and accordingly are concerned that the Fifth Circuit's decision, if upheld, would have impact far beyond its effect on collective ratemaking by carriers. As regulated entities, EEI's members are vitally interested in the standards to be established by this Court for the application of the *Parker v. Brown* and *Noerr-Pennington* doctrines to state regulatory processes and the activities of regulated entities pursuant to those processes.

EEI believes that the brief it is requesting permission to file will or may present to the Court discussion of several of the issues which is not likely to be contained in the briefs of the parties. These include:

First, petitioners argued below that this Court's formulation of the *Parker* doctrine in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), refined the Court's statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that private conduct is immune from antitrust scrutiny under the *Parker* doctrine only if it is compelled by a state acting as sovereign. The enclosed brief contains a more complete analysis of the sources of the *Goldfarb* compulsion language which should be helpful to the Court in its consideration of this issue.

Second, the enclosed brief contains additional discussion on the important issue of the effect of the Fifth Circuit's compulsion requirement for *Parker* immunity and its holding that the formulation of a tariff proposal is not protected by

Noerr-Pennington on forms of state regulatory activity other than collective ratemaking.

Third, many EEI members are in competition with governmental bodies acting in a proprietary capacity. It is believed that the enclosed brief should be accepted because of its discussion of the implications of the Fifth Circuit's holding that private parties are subject to a more stringent test for *Parker* immunity than are governmental actors.

Finally, the briefs of the United States in the court of appeals on the *Noerr-Pennington* issue were based upon a distinction between the collective presentation of a tariff proposal and the collective formulation of that proposal. EEI's brief contains discussion of this issue which it believes should be considered by the Court.

This the 26th day of July, 1984.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF REVERSAL

INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute (hereinafter "EEI") is the association of the nation's investor-owned electric utility companies. Its members serve 98 percent of all customers of the investor-owned segment of the electric utility industry and 75 percent of the nation's electricity users. EEI's members are subject to state regulation of service and price. Many jurisdictions also regulate capitalization, entry, and decisions concerning output, such as by certifying new power plants and by regulating their location.

As electric utilities subject to state regulatory supervision, EEI's members are concerned that the decision of the Court of Appeals for the Fifth Circuit (Unit B) will have an impact far beyond its effect on collective ratemaking by carriers. The decision of the court of appeals below may impose on EEI's members a much narrower definition of the "state action" doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943), than has been applied in the past, and may chill the formulation and presentation by private businesses of proposals for state administrative action. EEI's members have a direct interest in th issues presented for the Court's consideration in this case.

SUMMARY OF ARGUMENT

EEI files this brief as *amicus curiae* in opposition to the formal state compulsion requirement engrafted onto the *Parker v. Brown* "state action" doctrine by the Fifth Circuit. The particular activity in issue here, collective ratemaking, is a phenomenon peculiar to carriers. This brief is not submitted to support collective ratemaking, but rather to argue against the requirement imposed by the court below that actions taken pursuant to state regulatory schemes be compelled by the state in order to qualify for *Parker* immunity.

EEI submits that the *Parker* formula adopted by the Fifth Circuit is inconsistent with the variety of state regulatory systems which Congress intended to be permitted in the states' regulation of intrastate business activity essential to local welfare. Moreover, under our constitutional system of federalism, each of the fifty states must be permitted to determine in its own fashion the proper relationship between the state and businesses affected with a public interest in order to assure that essential public services are supplied at a reasonable price with acceptable external and regulatory costs. This Court's decisions establish that the Sherman Act was not intended to reach private conduct carried out pursuant to a clearly articulated and affirmatively expressed state policy if such conduct is supervised by the state. The decision below presumed the existence of active state supervision of the challenged activities, but found the Sherman Act applicable by erroneously inventing a "compulsion" requirement because private parties were involved. Moreover, by subjecting private parties to a more stringent standard of *Parker* immunity than their government-sponsored competitors, the decision discourages competition on the merits. This Court should reject the formulation of *Parker* adopted below which conceals a substantive judgment concerning the merits of collective ratemaking behind its creation of a requirement of form applicable to all state regulatory systems.

Finally, the decisions below artificially segregated group preparation of proposals for administrative action from the proposals themselves. The decisions failed to recognize that the First Amendment protects the entire process as a part of the right to petition the government guaranteed by the First Amendment and by the holdings of this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

EEI urges that the erroneous formulation of the *Parker* and *Noerr-Pennington* doctrines by the courts below be reversed.

ARGUMENT

I. The Court Should Disapprove the Fifth Circuit's Formulation of *Parker* Immunity as Requiring State Compulsion and Should Subject State Regulated Businesses to No More Stringent Antitrust Exposure Than Their Government-Sponsored Competitors.

The decision in *Parker v. Brown*, 317 U.S. 341 (1943), that the California raisin prorate program was not subject to the Sherman Act was predicated on the concepts that (1) the Sherman Act was not intended to restrain officers or agents of the state from "activities directed by its legislature," (2) actions of state officials are not the types of "business combinations" to which the Sherman Act was directed, and (3) federalism requires that congressional intent to prohibit state regulatory programs not be inferred lightly. *Id.* at 350-52. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693, 698-99 (1974). EEI submits that the approach taken by the Fifth Circuit violates the concepts underlying *Parker* by erecting compulsion as a formal precondition to *Parker* immunity instead of focusing on the nature and goals of state regulation and of the Sherman Act. This Court has declared that *Parker* immunity is available when the challenged conduct is supervised adequately by state regulators pursuant to a clearly articulated and affirmatively expressed state policy. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

The states have extended comprehensive regulation over businesses offering essential services to the public in order to meet perceived genuine public needs of important local concern. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 514 (1979). Price and service regulation exist to protect consumers from unreasonable practices and to further other goals, including the encouragement of investment in public service industries and the creation of incen-

tives for efficiency in production and use of the service.[1] J. C. Bonbright, Principles of Public Utility Rates 5, 27-31, 49-62 (1961). A recent examination of one form of state regulation applied to many utilities and carriers, the certificate of public convenience and necessity, concluded that those enactments were guided by policies of preventing wasteful duplication of facilities, preventing the destruction of service through "ruinous competition," assuring the preservation of service to marginal customers by restricting cream-skimming, providing a favorable investment climate for needed businesses, and protecting the public from external costs, including environmental damage. Jones, *supra* p. 3, at 428.[2] State utility regulatory concerns have a compelling quality and are not to be cast aside lightly in the absence of express congressional action or in favor of bright line tests. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S.Ct. 1713 (1983); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 103 S.Ct. 1905, 1915-17 (1983).

The Fifth Circuit, by conditioning *Parker* immunity upon compulsion, failed to take adequate account of these important state interests in structuring and regulating business activities

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[1]While the applicability to a particular industry of any or all of these reasons for displacing the marketplace with regulation may be debatable, as is the application to one industry of policies and practices developed in the regulation of another industry having dissimilar characteristics (e.g., the application to carriers of standards developed for the regulation of utilities having generally recognized local monopoly characteristics, *see* Jones, *supra* p. 3, at 505), this does not change the fact that the states have considered the condition of industries such as utilities and carriers that supply essential public services to their citizens and have enacted various regulatory systems designed to serve the public interest.

[2]While it might be objected that any group desiring protection could obtain state sponsorship of restrictions upon competition, experience does not support this argument. Ironically, the closest realization of the fear of private cartels using the state as a cloak is *Parker* itself. California's protectionism of a local crop understandably created a substantial Commerce Clause issue. Regulation of intrastate utility service involves stronger local interests while raising fewer threats to interstate commerce than the program in *Parker*.

which affect local welfare. In addition, the Fifth Circuit created a standard with anticompetitive implications insofar as it expressly subjected privately-owned regulated businesses to a stricter standard for *Parker* immunity than that applicable to the proprietary activities of governmental units. For these reasons, the decision below should be disapproved.

A. *The Fifth Circuit Misinterpreted this Court's Decisions as Embodying a Rigid Formal Compulsion Requirement.*

The Fifth Circuit erroneously concluded that this Court's formulation of the *Parker* doctrine includes a requirement of state compulsion. The court reached this faulty conclusion by finding that *Midcal* implicitly incorporated the statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975), that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."

In so concluding, the Fifth Circuit gave the Court's statement in *Goldfarb* far greater reach than was appropriate. The statement of a compulsion requirement was not necessary to the decision in *Goldfarb* because "far from exercising state power to authorize binding price fixing, [the state supreme court] explicitly directed lawyers not 'to be controlled' by fee schedules." 421 U.S. at 789 (footnote omitted). "It is difficult to believe that the Chief Justice [in *Goldfarb*] meant . . . to draw invidious distinctions between compulsion and prohibition; affirmative and negative requirements; and permissive, authorized and approved actions." Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 Colum. L. Rev. 1, 12 (1976).

The *Goldfarb* compulsion language was drawn from Justice Stone's observation in *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. The government and the Fifth Circuit read

this statement to mean that any state involvement short of formal compulsion constitutes "mere authorization" of anticompetitive conduct, and, therefore, is insufficient to overcome the paramount command of the antitrust laws. This view fails to recognize that state involvement in private conduct frequently takes a form that rises above mere authorization while falling below the Fifth Circuit's standard of formal compulsion. Moreover, the compulsion requirement applied below undermines the very foundation of *Parker* by failing to give fair regard to state regulatory policies that are an integral part of private conduct, but which do not compel private parties to act in a particular way. "The compulsions of law exist even when they take the form of approval or authorization." Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1384 (1978) (footnote omitted).

In *Parker*, Justice Stone cited *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904), for the proposition that a state may not authorize a violation of the antitrust laws, and it is to that case that we must look to determine the nature of the state authorization rejected by *dictum* in *Parker* and *Goldfarb*. The *Northern Securities* statements cited by Justice Stone were *dictum* in a case which had nothing to do with comprehensive state regulation of business. Moreover, with respect to matters of peculiarly local concern, the *Northern Securities* Court almost certainly would have sanctioned explicit state authorization of anticompetitive private conduct. Particularly in light of the evolution in the concepts of federalism, the scope of congressional power under the Commerce Clause, and the reach and breadth of the antitrust laws that has occurred since the decision in *Northern Securities*, the relationship between Congress and the states today cannot be governed by an expansive reading of its *dictum*.

Northern Securities affirmed a divestiture order preventing the consolidation under a holding company of a region's only two competing railroads where the purpose was to eliminate competition between the railroad lines. The principal issue

was whether, under the Commerce Clause, congressional power could be employed to direct one state-chartered corporation to sell the stock of another. The defendants' arguments and the Court's analysis took the then-accepted narrow view of congressional power under the Commerce Clause. Although the Court viewed Congress' authority to regulate interstate commerce as absolute, *id.* at 333, Congress at that time was powerless to regulate intrastate activities, *id.* at 331. "[A] State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade." *Id.* at 349. The defendants in *Northern Securities* argued that since they were state corporations acting within their charters, "the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations." *Id.* at 332.

The Court's finding of a violation and its affirmance of the remedy in the face of the defendants' argument says nothing about the appropriate treatment of anticompetitive conduct expressly authorized by a state pursuant to a program of business regulation. "[T]here [was] no pretense that the combination [there] in question was under the authority of the States under whose laws these railroad corporations were created," *id.* at 338,[3] and "nothing in the record tend[ed] to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition." *Id.* at 345.

The *dictum* concerning a compulsion requirement in *Goldfarb* was based upon Justice Stone's rejection of state authorization in *Parker* and must be read in light of his citation to *Northern Securities*. The fact that passive, uninformed state

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[3]Indeed, the defendants organized the holding company only after Minnesota, the state in which one of the railroads was incorporated, expressly had forbidden a merger of the railroads. *Pearsall v. Great Northern Railway Co.*, 161 U.S. 646 (1896).

"authorization" unrelated to any system of state regulation such as was involved in *Northern Securities* cannot serve to immunize private actors is no reason to conclude that *Parker* immunity depends upon state compulsion.

The Fifth Circuit stretched the impact of Justice Stone's comment far beyond its intended meaning. In addition, the decision of the Fifth Circuit is fundamentally inconsistent with this Court's recent recognition that issues of federalism cannot be resolved properly by mere reference to labels and bright line rules. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 103 S.Ct. 1905, 1915-17 (1983).

Because *Northern Securities* involved a regulated business it is easy to overlook that the avoidance of the Sherman Act urged in that case had nothing to do with state or federal regulatory concerns. *Northern Securities* supports the proposition confirmed by *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), that utilities are not exempt from the Sherman Act merely because of their status as such. Similarly, *Goldfarb* established that private conduct not sanctioned by the state is not immunized from antitrust attack merely because it might be viewed as consistent with state policy. Neither case supports the proposition that, absent formal state compulsion, actions taken pursuant to a comprehensive state regulatory program may be the basis for finding a Sherman Act violation.

B. *The Fifth Circuit's Formulation of* Parker *Improperly Restricts State Regulatory Options by Elevating Compulsion from Its Proper Role as Evidence of State Policy to a Rigid Precondition for* Parker *Immunity.*

The Fifth Circuit based its conclusion that compulsion is a threshold requirement for *Parker* immunity in part upon the belief that, with respect to private parties, the first *Midcal* standard of a clearly articulated and affirmatively expressed state policy necessarily includes a compulsion requirement. The court wrote:

> In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit.

United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 539 (5th Cir. 1983) (Unit B).

As a matter of logic, the Fifth Circuit is wrong. Whether a state chooses to compel particular conduct is not dispositive of whether the state intends to displace competition in a particular area of commercial activity. While state compulsion of specific anticompetitive conduct may be evidence of state policy, the relevance of compulsion must be limited to that: evidence of state policy.

The Fifth Circuit also ignored the federalism principles embodied in *Parker* which permit states to rely on private initiative in implementing state policies. *See Parker v. Brown*, 317 U.S. at 352 (producer proposal of marketing plan); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (auto dealer objections triggered state review of new dealer locations).

Courts should be reluctant to infer from the Sherman Act a congressional intent to preempt a state's exercise of its regulatory power. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). States should be free to enlist private initiative, in both its competitive and anticompetitive manifestations, in the furtherance of important state policies. If a state determines that particular forms of anticompetitive conduct further state goals, it should be free to encourage and supervise such conduct to insure that the relevant goals actually are advanced without being forced to prohibit competition that might further the same or other state objectives. Competition among the states in the pursuit of diverse solutions to the questions of regulation and competition will permit the develop-

ment of solutions that maximize consumer welfare and the efficient allocation of resources.[4] *See* Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of L. & Econ. 23 (1983) ("economic federalism" supports antitrust immunity for any conduct clearly authorized by a state so long as the economic and social costs of that conduct are borne by those who choose to locate or transact business within the state); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). To forbid states from utilizing anticompetitive conduct to accomplish state regulatory purposes unless they compel such conduct would stifle experimentation and undermine the cooperative approach to governance that is at the heart of our federal system.

As embodied in *Midcal*, the principles of *Parker* enable courts to detect private conduct masquerading as state action. The requirement of clear articulation and affirmative expression of the state's policy is sufficient to insure that the state's policy with respect to the challenged conduct is not neutral,[5]

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[4]If principles of federalism require the antitrust laws to yield to forthright state cartelization for the purpose of raising prices above competitive levels, *Parker*, and to a state's decision to deny entry to a profession regardless of its motive in doing so, *Hoover v. Ronwin*, 104 S. Ct. 1989, 1999 n.28 (1984), then surely those same principles support antitrust immunity for a state regulatory policy that impinges less upon antitrust policy by balancing competitive and anticompetitive forces to further state goals without regard to whether the state relies upon compulsory or voluntary anticompetitive conduct.

[5]*See Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

One explanation for the results in *Cantor* and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), is that the light bulb program was not perceived by the Court in *Cantor* as central to the state's concern with regulating electricity (428 U.S. at 584-85, 598, 605) while the regulations at issue in *Bates* directly concerned the state's valid regulatory concern with protecting the public from the unauthorized practice of law. 433 U.S. at 361-62.

While neutrality and the absence of state supervision properly were inferred in *Northern Securities*, which involved general and therefore neutral state corporation law, and in *Boulder*, which involved a broad "home rule" delegation of state power without any articulation of policy, it is submitted that neutrality and a lack of supervision were inferred

and that private conduct is not merely "prompted" by state policy.[6] Active state supervision insures that the state is not simply giving its blessing to anticompetitive private conduct,[7] and that the anticompetitive conduct actually serves to further the state's policies. The Fifth Circuit's further imposition of a threshold compulsion requirement serves only to limit states' regulatory options without furthering antitrust policy.

C. *Privately Owned Businesses Should be Subject to No Stricter Rules or Greater Exposure than Their Government-Sponsored Competitors.*

The Fifth Circuit's reasoning also would impair competition on the merits between private businesses and the proprietary activities of governmental bodies. Government entities, and especially municipalities, have long engaged in a wide variety of proprietary business activities. Cities today operate electric, gas, water, sewer and telephone utilities, bus and rail transit systems, recreational facilities, hospitals and a variety of other businesses. Many investor-owned utilities face competition from government-sponsored or publicly-owned counterparts. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Antitrust law, however, should clearly distinguish essentially commercial activities from *regulatory* functions and should afford such commercial activities of government no greater freedom to act anticompetitively than is permitted their private competitors.[8] The goals of the antitrust

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improperly in *Cantor* in view of the ongoing obligation on the state public service commission to regulate the utility rates in accordance with the just and reasonable standard.

[6]*See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[7]*See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

[8]The Department of Justice has supported this distinction in testimony before Congress concerning a proposal to overrule in part this Court's decisions in *Lafayette* and *Boulder*. *See* Statement of J. Paul McGrath, Assistant Attorney General, Antitrust Division, Before the Committee on the Judiciary, United States Senate, Concerning S. 1578, the "Local

laws would not be furthered by an immunity doctrine that confers artificial advantages on one set of competitors.

The Fifth Circuit concluded that this Court's formulation of the *Parker* doctrine in *Midcal* applied only to anticompetitive conduct of governmental parties. In the Fifth Circuit's view, this Court's decisions establish that the actions of a governmental entity, such as a municipality, are immune from antitrust scrutiny so long as they are pursuant to a clearly articulated and affirmatively expressed state policy and are actively supervised by the state,[9] but a private party's conduct is not immunized unless, in addition, it is formally compelled by the state. EEI submits that the *Midcal* formulation of *Parker* should apply to all businesses, whether publicly or privately owned and that the application of different federal antitrust standards to governmental and private actors ignores economic realities and is inconsistent with the policies of the antitrust laws. No stricter *Parker* test should apply to private businesses than was applied in *Midcal*.[10]

A majority of the Court has recognized that abuse of economic power by public bodies has consequences which are potentially as severe as those associated with the abuse of private economic power.

> Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a

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Government Antitrust Act of 1985," at 6 (April 24, 1984); *id.* at 10 (proposing amendment to bill in order "clearly [to] distinguish a local government policy decision to establish [a municipal electric] utility on a monopoly basis (and the competitive consequences of that decision) from purely commercial conduct by the utility that is unrelated to that policy decision").

[9]The Seventh Circuit has gone further and determined that state supervision of the anticompetitive activities of a municipality is not required for *Parker* immunity. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984).

[10]Should this Court apply a more lenient standard for *Parker* immunity to the commercial activities of municipalities such as the city in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984), then the same standard should apply to the private competitors of such municipalities.

> municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978).

> When [local governments] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.

Id. at 408. Indeed, the Chief Justice characterized the dispute between the municipalities and the investor-owned utility in *Lafayette* as "an ordinary dispute among competitors" and noted that there was no real difference between the cities and any other entrepreneur in the economic community. *Id.* at 419 (Burger, C. J., concurring).

In *Lafayette* this Court soundly rejected the cities' argument that they should be permitted to invoke the antitrust laws "to complain of . . . economic damage while baldly asserting that any similar harms they might unleash upon competitors or the economy are absolutely beyond the purview of federal law." *Id.* The Fifth Circuit's conclusion that private conduct is immune from antitrust liability only if compelled by the state, but that proprietary activities of government may be immune in the absence of compulsion, while not as extreme as the position of the cities in *Lafayette*, would lead to the creation of a serious competitive imbalance between municipal and private competitors.

Also, most municipal utilities are not subject to review and

supervision by state regulatory agencies.[11] While both investor-owned and municipal utilities ultimately are responsible to state legislatures, investor-owned utilities are subject to ever-present institutional supervision which often is lacking over their municipal counterparts. If the compulsion requirement is necessary to assure that particular conduct actually was that of the state acting as sovereign, 702 F.2d at 540-41 n.16, it is ironic that the decision below suggests that municipalities, which are in a sense less accountable to the state than their private counterparts, are to be tested according to a more lenient standard.

The *Parker* doctrine is grounded upon principles of federalism and the belief that Congress did not intend to restrict the activities of states as sovereigns. Yet concerns of federalism and state sovereignty do not support or justify the double standard for *Parker* immunity adopted by the Fifth Circuit. To the extent that government entities such as municipalities compete with private entities, their business decisions should be scrutinized according to the same standard as their private counterparts.

D. *The Decision Below Fails to Give Due Weight to State Regulatory Decisions and Conceals a Substantive Evaluation of State Policy Behind the Erection of a Requirement of Form.*

The Fifth Circuit's compulsion requirement reflects an unwarranted distrust of states and their agencies. In concluding that state supervision is not adequate to insure that state-sanctioned anticompetitive conduct furthers state interests rather than purely private purposes, the court of appeals in effect said

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[11] *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 404 n.27 (1978) ("municipally owned utilities [in Louisiana] are not subject to the jurisdiction of the [Louisiana Public Utilities Commission] and hence apparently need not conform their expansion policies to whatever plans the PUC might deem advisable for coordinating service"). *See also* C. F. Phillips, The Regulation of Public Utilities 118 (1984).

that federal antitrust intervention into state administrative processes is necessary to assure that those processes function properly. The court below stated: "[i]f a state wishes to displace federal antitrust laws, it should be permitted to do so only if it speaks in the clearest and strongest possible terms." 702 F.2d at 542. This view unnecessarily restricts the ability of state regulatory bodies to administer state programs.

The Fifth Circuit's version of *Parker* reflects an approach which has been criticized because it assumes that "all forms of state regulation, which are not compatible with the precepts of a competitive order, are regarded as alien intruders into the domain of free competition even though they may be satisfactory surrogate methods of social control." Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 Colum. L. Rev. 1, 3 (1976). Yet government regulation of the economy has deep roots.[12] *See generally id.* at 3-7. State regulation long predates the Sherman Act, and, as *Parker* recognized, there is no indication that Congress in enacting the antitrust laws intended to invalidate or to eviscerate such regulation by the imposition of formal procedural requirements. Given the long history of government regulation of the econ-

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[12]Even at the height of economic substantive due process review of state statutes, many forms of state regulatory action were upheld. *Id.* at 5 n.23. Professor Handler identifies the following examples of state regulatory programs that were upheld against an economic substantive due process attack:

> *Budd v. New York*, 143 U.S. 517 (1892) (rates for weighing and handling of grain); *Brass v. Staeser*, 153 U.S. 391 (1894) (rates for storage and handling of grain); *Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884) (water rates); *San Diego Land & Town Co. v. National City*, 174 U.S. 739 (1899) (water rates); *Van Dyke v. Geary*, 244 U.S. 39 (1917) (water rates); *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228 (1920) (pipeline rates); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (rent control); *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389 (1914) (rates for fire insurance); *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931) (commissions of insurance agents); *Stephenson v. Binford*, 287 U.S. 251 (1932) (rates for private carriers).

omy, a state's considered judgment that the encouragement and supervision of particular anticompetitive conduct will most appropriately advance an important state policy should not be overturned lightly.[13] This Court recognized as early as *Olsen v. Smith*, 195 U.S. 332 (1904) that broad application of antitrust policy to invalidate anticompetitive state regulatory programs would undercut altogether the ability of states to regulate economic activity and would significantly impair states' ability to legislate on matters of health, safety and welfare. *Id.* at 344-45 ("The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate. . . .").

The Fifth Circuit deemed irrelevant concerns that its holding would undermine the ability of state regulators to perform their regulatory functions. 702 F.2d at 542. According to the court, these objections "amount to the argument that competition does not work well, so the antitrust laws should not apply." *Id.* (citing *National Society of Professional Engineers v. United States*, 436 U.S. 679 (1978)). The teaching of *Professional Engineers*, however, is inapplicable to the states. This Court has emphasized that "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) (footnote omitted). In contrast to the court below, the *Parker* doctrine trusts states to balance competitive values with other state policies and to utilize private conduct in that balancing process as the states may determine.

EEI is concerned that a substantive judgment concerning

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[13] "[A]n anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed." *Cantor*, 428 U.S. at 611 (Blackmun, J., concurring).

the merits of the underlying activity in this case, collective ratemaking, lies behind the Fifth Circuit's reliance upon the absence of compulsion and that such a judgment may influence the contours of the *Parker* doctrine announced herein in a manner which needlessly impairs other activities undertaken pursuant to state regulatory programs. The Fifth Circuit's action is close to the kind of substantive review of state regulatory programs that began with *Lochner v. New York*, 198 U.S. 45 (1905), and was deservedly repudiated in *Nebbia v. New York*, 291 U.S. 502 (1934).

If this Court determines that the Sherman Act requires substantive review of state policies, it should articulate an approach that accounts for the lessons of the economic substantive due process era. To follow the path taken by the Fifth Circuit would invite courts covertly to review the substance of state policy while purporting only to consider whether it is stated with sufficient clarity, whether the form of its expression is sufficiently compulsory, and whether state supervision is sufficiently active. Unless the Court intends to engage in substantive review of state policies, it should be sufficient for *Parker* immunity that anticompetitive conduct is pursuant to a duly adopted state regulatory program and that the state is sufficiently involved to insure that private conduct furthers the state's interests and that the state is not simply giving its approval to essentially unrestricted private activity.

II. The Right to Petition Is Essential to the Regulatory Process and Was Not Properly Considered by the Decision Below.

The decisions below erred in holding that the group formulation of proposed tariffs is not covered by the *Noerr-Pennington* doctrine. *See* 672 F.2d at 476-77 (panel decision); 467 F. Supp. at 484-85 (district court decision). The Justice Department, the district court and the court of appeals each segregated the formulation of the proposed tariff from the proposal itself to avoid the appearance of raising *Noerr-Pennington*

and *Parker* concerns. Yet all parties agree that the proposal itself is protected petitioning activity. *See* 672 F.2d at 477; 467 F. Supp. at 484.

EEI submits that *Noerr-Pennington* protection of proposals for state agency action requires protection for their formulation. In *Noerr*, a joint agreement among the railroad presidents to seek anticompetitive legislation and to engage in a similar advertising campaign was not condemned as having significance independent of the activities themselves. The Court wrote:

> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint. . . . [S]uch associations . . . bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom . . . through the use of such devices as price-fixing agreements.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

The First Amendment principles embodied in the *Noerr* case demand linkage of a proposal for regulatory action with the formulation of the proposal. *See id.* at 137-38 (right to petition limits Sherman Act). "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *See also Claiborne Hardware* 458 U.S. at 913-14 (discussing *Noerr*); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (right of association undeniably enhances right to petition); *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

The district court initially recognized that the process of formulating proposals for government action is protected speech for First Amendment purposes:

> The First Amendment principles underlying *Noerr-Pennington* are nevertheless applicable by analogy. If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

467 F. Supp. at 485. *See also Horsemen's Benevolent & Protective Association v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098, 1110 (E.D. Pa.), *aff'd w/o opinion*, 688 F.2d 821 (3d Cir. 1982) (*Noerr-Pennington* applies to the formulation and presentation of jockey fee schedules to the state horse racing commission).

However, the district court and the court of appeals justified independent significance for the formulation process in the belief that "the industry's participation in the [ratemaking] process surpasses mere petitioning and renders the industry, in part, a decisionmaker." 467 F. Supp. at 485. In this posture, collective formulation became collective ratemaking. *See id.* (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593-94, 601-02 (1976) (Opinion of Stevens, J.)). Such a rationale, if allowed to stand, would undermine the right to petition. Every successful petitioner of government would have the state's acts imputed to him, regardless of his actual responsibility for the policy. Such a construction of the *Noerr* doctrine would work against the doctrine's purpose of encouraging petitioning activity. In this case, the courts' justification is also inapplicable because all parties agree that each state actively supervises the ratemaking process. 702 F.2d at 539. Justice Stevens' comments in *Cantor*, 428 U.S. at 584-85, about passive governmental acceptance of light bulb tariffs thus have no application here. Moreover, the district court's reasoning overlooks the fact that since the tariff in *Cantor* was in effect prior to the existence of state regulation, *id.* at 599-600, no *Noerr-Pennington* issue was raised by that case.

Again, EEI is not supporting the merits of collective ratemaking. Special considerations may attach to collaborations among competitors concerning price that may, in some circumstances, justify injunctive relief based on a theory that the defendants have agreed to stabilize prices[14] or have restrained trade by agreeing to forego the freedom to price unilaterally[15] where an agreement separate from an agreement to collaborate in forming a petition may be inferred from otherwise protected activity.

EEI is concerned that the Fifth Circuit's decision will deter the formulation and presentation of proposals for administrative action, especially those that are subject to regulatory supervision and review by governmental decision-makers. If affirmed, the decisions below mistakenly would risk subjecting all collaborations to formulate petitions for relief to state agencies to attack as "independently cognizable" agreements in restraint of trade.

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[14]*United States v. Container Corporation of America*, 393 U.S. 333 (1969), reversed a district court's refusal to enjoin an agreement among members of a trade association to exchange price information. The government had alleged that the purpose of the agreement to provide price information was to chill competition and had conceded that a simple agreement to provide information would not be actionable. The district court found that in fact there had been variations in price which contradicted the inference of a purpose or effect to chill competition. The Court disagreed with that ruling, finding instead that the evidence showed that the agreement facilitated oligopolistic pricing within a narrow band of variation. Although acknowledging that *Container Corporation* did not involve an agreement to adhere to particular prices as had existed in *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936), or *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Court found that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." 393 U.S. at 338 (footnote omitted).

[15]At common law an association formed to present a joint bid at a public auction was an agreement in restraint of trade because of the agreement, express or implied, to forego unilateral action. *Kearney v. Taylor*, 56 U.S. (15 How.) 494 (1853). The petition in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), relied on by the Justice Department also alleged an agreement to refrain from unilateral action.

III. Conclusion.

In the final analysis, the First Amendment and federalism issues in this case are related because of the deleterious impact of both the rigid formulations of the *Parker* doctrine and the artificially simplified models of state regulation effectively adopted by the decision below upon the ability of regulators and regulated industries to function. For the foregoing reasons the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 1984, three copies of the above Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* in Support of Reversal have been served on the parties of record via United States mail, first-class, postage prepaid and properly addressed as follows:

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